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No. 03-362

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

LAWRENCE S. BITTAKER, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Warden Jeanne Woodford files this reply to respondent Lawrence Bittaker's opposition to the petition for writ of certiorari. In the petition, the Warden seeks review on one question: whether an order, issued for the stated purposes of guarding against unfairness at a state-court retrial and protecting the state attorney-client privilege, improperly amounts to a federal habeas court's anticipatory determination of fair-trial and state-law claims that have never been presented in or adjudicated by any state court.

*

Respondent Bittaker spends a significant amount of time focusing on federal discovery rules and discovery practice in attempting to explain why certiorari should not be granted in this case. (Opposition Brief [Opp.] 5-9.) According to Bittaker, because federal habeas courts have discretion to grant discovery and issue discovery orders, the protective order issued in this case was proper. *Id.* This oversimplified outlook—shared by the Ninth Circuit—completely misses the unprecedented significance of the new power afforded to federal habeas corpus courts operating in the Ninth Circuit.

That it was a discovery order—and in particular a protective order—that was the vehicle used by the district court to provide certain future protection to Bittaker, should there ever be a state court retrial in this case, is inconsequential. Instead, the focus must be on the protection—or more appropriately the relief—provided by the federal habeas court, and not the title of the order in which that protection was provided.

Here, the district court, with Ninth Circuit approval, ruled that none of the materials and/or information revealed by Bittaker to the Warden during the federal habeas proceedings could be used against Bittaker at a potential state court retrial because such use would be unfair and inconsistent with California's attorney-client privilege jurisprudence. App. A16-A18. But a federal habeas court has no power to predetermine that the admission of certain evidence at a state court retrial would deprive a defendant of a fair trial. Such an evidentiary ruling is wholly inconsistent with federal habeas corpus jurisdictional principles, comity-based abstention principles, and the requirement that state court remedies be exhausted before the availability of federal habeas corpus review. And it should go without saying that a federal habeas court has no business in hypothesizing how a state court might apply its attorney-client privilege law in a given case, and then relying on that guess to effectively provide relief on a claim that must first be presented in state court.

It is always for the state courts in the first instance to determine whether evidence might be admissible at a state court criminal trial, and whether the Constitution is compromised by the admission of certain evidence. And it is for the state courts to decide the impact of its own evidentiary privileges on state court admissibility issues. Federal habeas corpus courts, reviewing petitions under 28 U.S.C. § 2254, must wait until the state court review process has run its course before reviewing whether any "unfairness" occurred at a state court trial. Federal habeas courts are not permitted to make that decision in

advance. No federal discovery rule, nor any other rule or statute, authorizes a federal habeas court to exercise such unprecedented and inappropriate power.

Finally, Bittaker, relying on a passage in the Ninth Circuit's en banc opinion, contends that the order is proper since state trial prosecutors have other available avenues from which to seek and obtain the materials and information the Warden is prohibited from disclosing. (Opp. 8-9.) But it is improbable speculation on both Bittaker's and the Ninth Circuit's part that, as a practical matter, anyone other than the current attorneys for Bittaker and the Warden possess any of these materials. The unrealistic nature of this speculation is demonstrated by Bittaker's disingenuous suggestion that he might again open the door for state trial prosecutors to seek access to the protected materials. More important, even if state trial prosecutors had a source other than the Warden's attorneys from whom to obtain these materials for purposes of a retrial, that possibility would not legitimize an otherwise inappropriate and unlawful protective order.

CONCLUSION

For these reasons, the Warden respectfully requests that this Court issue a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals in this case.

Dated: October 16, 2003

Respectfully submitted,

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